(1)

83-1964

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEONARD BEDNAR,
Petitioner,

vs.

UNITED STATES OF AMERICA.
Respondent.

On Writ of Certiorari
To the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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52 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Court of Appeals established proper guidelines for determination of the issue of materiality of testimony before the grand jury, including:

A. Whether there is conflict with the Court of Appeals for the Fifth Circuit as to the nature and quantum of proof necessary to establish materiality, and

B. Whether petitioner was deprived of his Sixth Amendment right to cross-examine an FBI agent, a crucial witness on the materiality issue.

II.

Whether a new account report (Govt. Exh. 12), a document maintained by a stock brokerage firm in compliance with a rule of the National Association of Securities Dealers (NASD), can be the basis for a conviction for violation of a vague SEC regulation (17 C.F.R. 240.17a-3, subparagraph 9, requiring the keeping of certain records, including:

A. Whether an SEC employee may express an expert opinion that the brokerage firm's document is one required to be kept by the regulation.

B. Whether the government's own evidence, proving that the document was maintained to comply with the NASD rule rather than the SEC regulation, may be disregarded, and

C. Whether it was error to instruct the jury that the document was required by the SEC regulation.

III.

Whether petitioner's grand jury testimony should have been suppressed because government counsel, several weeks before

his appearance, advised him that he was not under investigation, but later changed their position and failed to inform petitioner before his appearance that he was then a target of the investigation.

IV.

Whether the grand jury function was abdicated by improper action of government counsel and the FBI case agent in telling the grand jury their version of the evidence and of conflicts in the testimony and directing the grand jury as to how to vote on the indictment.

LIST OF PARTIES

Petitioner Leonard Bednar is an individual residing in St. Louis County, Missouri.

Although not a party to the proceeding below, the affairs of Stix & Co., Inc., a stock brokerage firm headquartered in St. Louis, Missouri, were involved. As a result of proceedings brought by the Securities & Exchange Commission, Stix & Co. discontinued business in November, 1981.

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OPINIONS BELOW

This cause was decided on February 24, 1984, by a panel of the United States Court of Appeals for the Eighth Circuit (Circuit Judges Ross and Arnold and District Judge Hunter, sitting by designation), in an opinion which is reported as *United States v. Bednar,* 728 F. 2d 1043 (8th Cir. 1984). The opinion is reproduced as Appendix A hereto.

On April 2, 1984, the Court of Appeals entered an order denying petitioner's petition for rehearing and suggestion of appropriateness of rehearing en banc. (See Appendix B.) No opinion was written, and the order has not been officially reported.

JURISDICTION

The judgment of the United States Court of Appeals affirming petitioner's conviction was entered on February 24, 1984. (See Appendix A and C.) A timely petition for rehearing and suggestion of appropriateness of rehearing en banc was denied on April 2, 1984 (See Appendix B.)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND RULES INVOLVED

This petition involves an interpretation of the Fifth and Sixth Amendments to the Constitution of the United States (grand jury, confrontation and cross-examination), the text of which are set out in Appendix D.

Petitioner was charged with felony violations of 18 U.S.C. § 1623 and 15 U.S.C. § 78q(a)(1) and 78ff, the text of which are set out in Appendix C.

This petition also involves interpretation of a regulation of the Securities and Exchange Commission, 17 C.F.R. 240.17a-3, subparagraph 9, the text of which is set out in Appendix F, and a rule of the National Association of Securities Dealers, § 21(b), the text of which is set out in Appendix G.

STATEMENT OF THE CASE

Petitioner Leonard Bednar was convicted on four counts of a superseding indictment (R. 1-6)[1], three counts of which charged him with making false material declarations under oath to a federal grand jury, in violation of 18 U.S.C. § 1623. The fourth

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[1] References to "R." are to the Record on Appeal filed in the Court of Appeals.

count charged a violation of 15 U.S.C. §§ 78q(a)(1) and 78ff in that petitioner, as a broker-dealer registered under the Securities Exchange Act, made false entries on the books and records of Stix & Co., Inc., particularly a new account report for the margin account of J. A. Miller.

The investigation of this matter began as a result of the fraudulent activities of Thomas Brimberry, who was associated in various capacities over a number of years with Stix & Co., a St. Louis brokerage firm. He had been in charge of the margin department, and, in late 1979 and early 1980, became a director, Vice-President and the controlling managerial officer of the firm (IV Tr. 175ff).[2] Petitioner was also associated with Stix & Co., and, until Brimberry took charge, had been the operations officer; after Brimberry's assumption of control, petitioner remained as secretary and a director. Both Brimberry and petitioner were registered representatives, and because they became registered at about the same time, they had a commission-sharing arrangement for all business generated by either one.

In November, 1981, Brimberry's fraud came to light, and it was learned that, by the use of phony stock certificates and large credit balances which he fraudulently created in certain margin accounts, he was able to withdraw millions of dollars from the accounts. There was no evidence that petitioner had participated in any of these fraudulent activites or that he received any of the money, except for his share of the commissions generated.

As a result of the Brimberry misdeeds, a federal grand jury was convened, and petitioner appeared without counsel and testified on February 25 and 26, 1982. An issue is raised in this

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[2] The transcript of trial proceedings consists of six volumes, each starting at page 1. References to the transcript in this petition will be to the volume (IV) of the transcript (Tr.), followed by the page or pages (175ff).

petition concerning whether petitioner should have been given *Miranda* warnings, and the relevant facts are detailed in Question III of the Argument. Petitioner was asked a number of questions concerning a variety of matters, and the indictment herein was returned because of apparent conflicts between his testimony and that of other grand jury witnesses. Question IV of this petition raises a question concerning improper use of the grand jury process.

Counts I, II and III charged that petitioner made false declarations before the grand jury.[3]

Count I related to Internal Revenue Service informational forms 1087, which apparently had not been mailed to the IRS, and it was alleged that petitioner lied when he testified that he had not told Brimberry and another person (Alice Eads) not to mail the forms in. There was a conflict in the testimony as to the year or years involved.

Count II related to the deletion of dividend records from the computer servicing Stix & Co., it being alleged that petitioner perjured himself in denying that he had been told by a Stix employee, Alice Eads, that Brimberry had told her to delete the dividend entries and that petitioner told her to do so and to throw away back-up documents.

Count III related to a form kept by Stix & Co., known as a new account report, pertaining to one of Brimberry's phony accounts, the J.A. Miller margin account. Petitioner was charged with perjuring himself in testifying before the grand jury that he had received certain information concerning the background of J. A. Miller from Brimberry and that he knew that the report was prepared in 1981, rather than in 1977 as indicated on the report.

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[3] Although the offense under 18 U.S.C. § 1623 is no longer covered by § 1621 relating to "perjury generally", we will nevertheless refer to the offense charged in this case by the more convenient term "perjury".

There were conflicts in the testimony at the trial between government witnesses and petitioner. The main government witnesses on the three perjury counts were former Stix employees Denise Hertlein and Alice Eads. (Brimberry did not testify.) An issue is raised on this appeal as to the materiality of the grand jury testimony of petitioner, and a more detailed discussion of the evidence pertaining to that issue is contained in the Argument section of this petition. (See Question I.)

Count IV, the false record count, related to the same J. A. Miller new account report as involved in Count III, and alleged that petitioner knowingly prepared the report with false information, in violation of 15 U.S.C. § 78q(a)(1) and 17 CFR 240.17a-3. The new account report was introduced as Government's Exhibit 12. An issue was created at trial and is raised in this petition as to whether the report is a document required to be kept by SEC regulations; included in this issue is whether SEC employee O'Rourke should have been permitted to testitfy as an expert that the report was required by SEC regulations. (See Question II.)

Petitioner denied any wrongdoing as to forms 1087 (Count I). His position was that he had caused the forms to be mailed during the year in which he was chief operations officer, but that for the years in question he had no responsibility as to such forms because Brimberry had already assumed control of the company; he denied the conversations with Brimberry and Miss Eads (V Tr. 57-85).

As to Count II, relating to dividend deletions, petitioner's position was that Miss Eads may have come to him concerning the deletion, but that it was a routine inquiry in which she indicated that Brimberry, who had produced the business, had told her to delete the dividends. Petitioner testified that he had merely told her to do whatever Brimberry said, because Brimberry would be familiar with any problems with the account (V Tr. 48-57).

With reference to the new account report which was the subject of Counts III and IV, petitioner acknowledged that he had completed some of the information, but testified that he had done so according to a routine practice of securing background information of the owner of the account from Brimberry. Petitioner signed the report, based upon Brimberry's information, because he shared commissions on all Brimberry accounts. Petitioner's position as to Count IV was that this particular form was not required by SEC regulations (V Tr. 13-48).

The trial lasted six days before the Hon. John F. Nangle, United States District Judge for the Eastern District of Missouri. In addition to the evidence relating to the specific counts of the indictment, there was considerable evidence through witnesses Owens, O'Rourke, O'Connell, Hamer and Gaynor concerning other activites in the operation of Stix & Co., which were not relevant to the specific charges of the indictment.

The jury deliberated for approximately six hours (VI Tr. 37), and returned a verdict finding petitioner guilty on all four counts charged. On February 4, 1983, petitioner was sentenced to concurrent terms of five years imprisonment on each count and a fine of $1,000 on each count, for a total of $4,000.

Petitioner duly filed his notice of appeal to the United States Court of Appeals for the Eighth Circuit (R. 71), and has remained free on bond pending appeal. The cause was argued before a panel of the Court of Appeals on November 16, 1983, and on February 24, 1984, an opinion was filed affirming petitioner's conviction, *United States v. Bednar,* 728 F. 2d 1043 (8th Cir. 1984). (See Appendix A.) Thereafter, petitioner filed a petition for rehearing and suggestion of appropriateness of rehearing en banc, which was denied on April 2, 1984. (See Appendix B.)

This petition for a writ of certiorari seeks to review the judgment of the Court of Appeals affirming the conviction of petitioner.

ARGUMENT

I.

Materiality

Counts I, II and III charged violations of 18 U.S.C. § 1623, making a false declaration before a grand jury, commonly referred to as perjury. One of the essential elements of the offense is that the statement before the grand jury be a material declaration, and petitioner believes that the government here failed to prove materiality.

We will not quarrel with the general statements of the law as to materiality in the second paragraph of Section II A of the opinion below. But we believe that the opinion is in error in determining the troublesome question of the quantum of proof to prove materiality, as well as the appropriate method of proof. In deciding these issues adversely to petitioner, the Court of Appeals in in conflict with *United States v. Cosby,* 601 F. 2d 754, 60 A.L.R. Fed. 67 (5th Cir. 1979), and in addition has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

A. Conflict with *United States v. Cosby.*

In attempting to distinguish *Cosby,* the Court of Appeals here said that "in the instant case, the transcript of the grand jury proceedings *and* the testimony of the grand jury foreman supplemented the testimony of the FBI agent." If "the transcript of the grand jury proceedings" refers to the grand jury testimony of petitioner, such testimony is not sufficient to show materiality of that testimony. *United States v. Koonce,* 485 F. 2d 374, 381 (8th Cir. 1973). If "the transcript of the grand jury proceedings" refers to all transcripts of all witnesses who appeared before the grand jury, then the Court of Appeals here was in error because all transcripts were not a part of the record presented to the District Court.

"The testimony of the grand jury foreman" added nothing to the issue of materiality. An examination of his direct testimony by leading questions (II Tr. 188-191) shows that there was nothing in it to enlighten the Court as to what the grand jury was investigating (other than "securities fraud and mail fraud . . . and other violations of securities laws also"), or what was material to their investigation. The only effort to ask questions relevant to the materiality issue was by petitioner's counsel, who was quickly cut off by the Court whose mind had already been made up on the materiality issue (II Tr. 194).

The government, however, apparently had some second thoughts as to the sufficiency of its evidence, for it then offered the grand jury testimony of FBI Case Agent Gulley, Exh. AA and Gov. Exh. 17 (IV Tr. 73-74, 104-106). But his testimony was not as to what the grand jury was investigating; instead it was what he himself was investigating. In effect, his testimony did not tend to prove materiality, but was instead the prosecutor's direction, through the mouth of the FBI agent, for the jury to find what the prosecutor wanted. (See also Question IV presented by this petition.)

The evidence submitted by the government to support a finding of materiality in this case is almost identical to that which was found insufficient in *United States v. Cosby*, 601 F. 2d 754 60 A.L.R. Fed. 67 (5th Cir. 1979). The similarity appears from the Court's statement at p. 756:

> "In order to demonstrate that Cosby's declarations were material to the grand jury's investigation, the government presented the testimony of an FBI agent who was working with the grand jury and the testimony of a witness who appeared before the grand jury concerning what they knew of the purposes of its investigation. In addition, the court examined the indictment, which recites the matters under consideration by the grand jury and the questions asked of Cosby. On the basis of this evidence, the trial court made a finding that Cosby's declarations were material to the subject of the grand jury's investigation."

After recognizing that the government may prove materiality in various ways, such as the transcript of prior proceedings or the testimony of the grand jury foreman, the Fifth Circuit stated (at p. 757):

> "In this case the government chose to use as evidence of materiality the testimony of an FBI agent who was assigned to work with the grand jury, the testimony of a witness who merely testified before the grand jury and the indictment. No explanation has been offered for the failure to adduce the transcript of the grand jury proceedings or the testimony of the foreman or some other member of the grand jury. *Examination of the evidence that was presented leaves us unable to conclude that it was legally sufficient to support the court's finding of materiality.*" [Emphasis supplied.]

The Fifth Circuit further observed, in footnote 4, that although the foreman of the grand jury did testify at the trial, his testimony really had no impact upon the question of materiality. In the instant case, the only questions which were asked of the foreman which might have had some effect upon the issue were asked by the defense and disallowed by the Court (II Tr. 192-194).

With reference to the testimony of the FBI agent assigned to work with the grand jury, the Court in *Cosby* referred to the agent's understanding of what was being investigated, and concluded (at p. 758):

> "An FBI agent, even one sworn in as an 'agent' of the grand jury, neither controls, directs nor participates in grand jury decisions. His statements about his investigation merely attest to his own purposes and actions, not to the nature, scope or extent of the grand jury's inquiry."

Compare with the October 6, 1982, grand jury testimony of FBI Agent Gulley, pages 4-5, 17, 22-24, 32.

Although the entire grand jury testimony of petitioner was available to the trial Court here, that cannot determine the issue of materality to the entire investigation by the grand jury, for as the Court in *Cosby* said (at p. 759):

> "Like the trial court, we are hampered in this task because the transcript of the grand jury investigation has not been made part of the record. Even if we had no doubt that Cosby's testimony was generally material to the investigation, *the issue is whether the statements quoted in the perjury indictment were material.*" [Emphasis supplied.]

The Fifth Circuit in *Cosby* concluded that, in view of the failure of the government to present sufficient proof of materiality, the conviction must be reversed and remanded for entry of a judgment of acquittal. In holding otherwise in the instant case, the Eighth Circuit is in conflict with the Fifth Circuit. See also *United States v. Bell,* 623 F. 2d 1132, 1134-1135 (5th Cir. 1980), and *United States v. Thompson,* 637 F. 2d 267, 268-270 (5th Cir. 1981).

B. Departure from accepted and usual course of judicial proceedings.

When the grand jury testimony of Agent Gulley was offered by the government on the issue of materiality, petitioner objected on the ground that "it is a deprivation of a right of cross-examination". The record was clear that the agent was not unavailable as a witness but was in fact standing in the court room (IV Tr. 104). No reason was given as to why the agent should be exempt from cross-examination.

The denial of petitioner's right of cross-examination, a patent violation of the Sixth Amendment to the Constitution of the United States, was not even discussed by the Court of Appeals. This departure from the accepted and usual course of judicial proceedings by the lower courts should be reviewed by this Court.

* * * * *

The issue of materiality is involved in every prosecution under 18 U.S.C. § 1623. It has generated much litigation — see Annotation at 60 A.L.R. Fed. 76. The cases give little assistance in determining what evidence will satisfy the government's burden of proof on this issue, and attempts to decide the problems of the method and quantum of proof of materiality have produced conflicting decisions, as in the instant case of the Eighth Circuit and *Cosby* of the Fifth Circuit.

We respectfully suggest that certiorari should be granted as to this Question, not only to resolve the conflict between the Circuits but also to recognize the Sixth Amendment right of cross-examination.

II.

No false record (Govt. Exh. 12)

Count IV of the indictment charged a violation of 15 U.S.C. § 78q(a)(1), which requires stock brokers to keep records required by the SEC. The penalties for violation of the statute or rules or regulations are contained in § 78ff(a). (See Appendix E for text of these statutes.)

The record involved in this case was the new account report for the margin account of J. A. Miller (Govt. Exh. 12), which the government contended was a document required to be kept by 17 C.F.R. 240.17a-3, subparagraph 9. (See Appendix F for the text.) To support its position, the government had witness O'Rourke of the SEC testify as an expert that Govt. Exh. 12 was a document which the SEC requires pursuant to subparagraph 9 (II Tr. 74). Petitioner raised the issue and objected before testimony began (I Tr. 2, 5; II Tr. 2-7, 10-13), and at the time the witness so testified (II Tr. 48-49, 70-72, 74).

Petitioner contends that it was error to permit the witness to express an expert opinion on this subject. It was not only contrary to the actual fact, as hereinafter pointed out, but it was not an appropriate subject for expert opinion. It invaded the province of the jury, if indeed a submissible case was made on the issue of whether it was a required document.

We believe that the evidence was clear that the new account report was not required by the regulation, but was instead a document required only by the NASD, the National Association of Securities Dealers, a non-government agency (II Tr. 76-77). Section 21(b) of the NASD rules (Appendix G) requires broker firms to keep records containing all of the information included on Govt. Exh. 12. It was the position of petitioner that Govt. Exh. 12 was required only by the NASD rule (II Tr. 82, 86-89, 110-114), and that the document required by the SEC regulation was Deft. Exh. A, and, if it involved a margin account, Deft. Exh. B (II Tr. 108, 114-115).

Every bit of information required by the NASD rule is included on Govt. Exh. 12, but much of the information on Exhibit 12 is not required by the SEC regulation. The SEC regulation merely requires the name and address of the beneficial owner, which appeared on the permanent records of Stix & Co. as exemplified by Deft. Exh. A. The SEC regulation does, however, require an additional bit of information for a margin account, the signature of the owner, and this appeared on the permanent records of Stix & Co. as exemplified by Deft. Exh. B. Those records were properly kept in accordance with the SEC regulations.

The Court of Appeals said that the testimony of Denise Hertlein supported the conviction on Count IV, but actually her testimony was further proof that Govt. Exh. 12 was not the document contemplated by the SEC regulation. When asked what document she would obtain if an SEC examiner asked for the information required by the SEC regulation (the name and

address of the beneficial owner), she immediately pointed to Deft. Exh. C (similar to Deft. Exh. A) (III Tr. 198). This, of course, was not the document on which the prosecution was based.

Even if the information contained on Govt. Exh. 12 was false, it was at the most a violation of the NASD rule, and such a violation does not constitute a violation of Federal law. Count IV should not have been submitted to the jury because no violation of 15 U.S.C. §§ 78q(a)(1) and 78ff(a) was shown, and the Court of Appeals erroneously affirmed the conviction.[4]

As previously indicated, the Court permitted the SEC witness to express an expert opinion that Govt. Exh. 12 was required by 17 C.F.R. 240.17a-3. But at the conclusion of the case, the Court actually took this factual issue away from the jury and in effect directed a verdict of guilty, for the Court instructed the jury as follows, in Instruction No. 21:

> "A rule of the Securities and Exchange Commission requires that a record must be kept of the name and address of the beneficial owner of an account. You are instructed that Government Exhibit 12, the J. A. Miller new account report, is a record which contains the name and address of a beneficial owner of an account."

Petitioner objected to the giving of this instruction (VI Tr. 7). It was error to so instruct, for even if Count IV should have been submitted to the jury, the conflict in evidence as to whether Govt. Exh. 12 was required by SEC regulation or NASD rule should have been left for the jury to determine.

We have been unable to find any other decision in which a conviction is based upon the alleged violation of a regulation

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[4] Because Count III was based on the same document, the issues with reference to that Count were also affected, and this is an additional reason for review and reversal of the conviction on Count III.

whose relationship to the facts in evidence is as questionable as here. The Court of Appeals has established a dangerous precedent for creating a crime out of the alleged violation of a vague and inadequately defined SEC Regulation, as it may be interpreted by a non-policy making SEC agent to apply to a brokerage firm's internal documents maintained for reasons other than the SEC Regulation.

Because this case presents a question of exceptional importance which can affect not only SEC regulation matters but the entire federal regulatory system, we believe that certiorari should be granted as to this Question.

III.

Petitioner's grand jury appearance

Prior to his grand jury appearance, petitioner was interviewed by government agents and was advised by government counsel that he was not under investigation. As reflected by the transcripts of his testimony before the grand jury on February 25 and 26, 1982, he was given no warning before he testified.

On Friday before the trial began, petitioner was furnished with *Jencks* statements, including grand jury transcripts of FBI case agent Gulley and other former Stix & Co. employees who testified at trial, including Alice Eads, James Hamer and Daniel L. O'Connell. These transcripts revealed that, at the time petitioner appeared before the grand jury, he was very much a target and potential defendant. Petitioner immediately filed a motion to suppress his grand jury testimony (R. 7), which set out in detail his contentions that he had been misled by the government when he testified before the grand jury. (For this Court's convenience, the motion to suppress is reproduced in Appendix H to this petition.)

The motion to suppress pointed out that just before petitioner testified, Assistant United States Attorney Adelman advised the grand jury that they still did not know defendant's role and this

was something for the grand jury to determine. As previously indicated, petitioner had been assured that he was not a target, but Mr. Adelman did not inform him of the change in the position of the government. Significantly, right after petitioner testified, Mr. Hamer was told that he was not a target, and Miss Eads was similarly advised. As to Mr. O'Connell, he was told just before he testified that the United States Attorney's Office "has not made a decision as yet as to whether or not - what your total criminal liability is", and he was then advised that he had the right not to testify if he so desired.

We believe that, especially in view of the fact that petitioner had been told that he was not under investigation, when the government changed their outlook on him so that he was still open as a target at the time of his appearance, he should have at least been given a warning similar to that given to Mr. O'Connell. The failure to inform him of the government's change of position lulled him into a false sense of security.

In *United States v. Edgerton,* 80 F. 374, 375 (D.C. Mont. 1897), the Court stated:

> "It is fatal to the indictments that the defendant was called to testify in the particular matter from which they resulted, without being informed or knowing that his own conduct was the subject under investigation."

We are not unmindful of cases which hold that a grand jury witness is not immune from indictment because he was not given *Miranda* warnings, where he incriminates himself or other evidence develops afterwards, but we believe that protection is required against deception, fraud or duress practiced by the government. See *United States v. Gilboy,* 160 F. Supp. 442, 461 (D. Penna. 1958):

> "While the government may not practice deception, fraud or duress upon an accused to obtain evidence, it is not required to advise him of his rights as to self-

> incrimination. [Cases cited.] The question is not and should not be subject to any fixed rule. [Authority cited.] The relevant inquiry must always be whether the testimony was freely given, all things considered. [Cases cited.]"

Compare *United States v. Kreps,* 349 F. Supp. 1049 (W.D. Wis. 1972).

The circumstances of this case reflect statements to the grand jury "induced by governmental tactics or procedures so inherently unfair under all the circumstances as to constitute a prosecution for perjury a violation of the Due Process Clause of the Fifth Amendment." (Justice Brennan concurring in *United States v. Mandujano,* 425 U.S. 564, 585 (1976)). Petitioner should have been advised before his grand jury appearance that there was a change in the position of the government.

We recognize the law as stated by the Court of Appeals that full *Miranda* rights and warnings are not required in the grand jury context.[5] However, the general rule is distinguishable here because petitioner was affirmatively advised by government counsel handling the grand jury (not just "government agents" as indicated in the opinion) that he was not under investigation. Later, the government's view of his role changed and he was indeed a target, but the Assistant United States Attorney did not correct the statement made earlier. This all occurred before he testified.

It was inherently unfair under these circumstances to bring petitioner before the grand jury without further warnings and without advice of the change in the government's position. Although it may be correct that a grand jury witness is not

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[5] Even if the rule as stated by the Court of Appeals may be applicable to a prosecution for giving false testimony, the Court disregarded its effect upon Count IV. Improperly obtained evidence was used by the government to taint the prosecution of that non-perjury Count.

generally entitled to *Miranda* warnings, it is a different situation where, in effect, erroneous warnings are given.

Because of the potential for abuse of grand jury witnesses which the opinion herein fails to control, we believe that certiorari should be granted as to this Question.

IV.

Improper influences on grand jury

Petitioner testified before the grand jury in February, 1982, and numerous witnesses testified before and after that time. One of the witnesses who testified just before defendant was FBI case agent Gulley.

On October 6, 1982, apparently after the grand jury had heard from all of the witnesses, Agent Gulley was again brought before the grand jury, just two weeks before petitioner's indictment was filed.[6] By a combination of leading questions, statements by the government attorney which the agent affirmed, and other questions directed to him, Agent Gully was able to tell the grand jury exactly what to do. In effect, he was the alter ego of the prosecutor telling the grand jury what the evidence showed and directing the grand jury as to how to vote and return indictments.

Knowledge of the role played by Agent Gulley in the direction to the grand jury did not come to petitioner until the noon recess on the fourth day of trial (IV Tr. 72), when a transcript of his testimony was furnished on the issue of materiality. (See Question I.) Petitioner's counsel immediately moved for a dismissal of the indictment because of the improper influences

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[6] The original indictment against petitioner was returned on October 21, 1982. The superseding indictment on which petitioner was tried (R. 1) was filed on December 14, 1982, but did not change the basic charges of the original indictment.

on the grand jury, but the District Court denied the motion (IV Tr. 72-74).

A reading of Agent Gulley's testimony on October 6 shows the extent to which the prosecutors used him to achieve the desired indictment from the grand jury. On pages 3-4, he is identified as the case agent "working through the grand jury and through the United States Attorney's office" and with other governmental agencies. Page 6 reveals that he "reviewed the grand jury testimony" of petitioner. Thereafter, government counsel and the agent proceeded to analyze the evidence and instruct the jury.

This was not a situation, as the Court of Appeals rationalized, where the agent was merely repeating hearsay. Instead his testimony was a summary and evaluation of non-hearsay evidence which the grand jury had from other witnesses, and it constituted a direction to the grand jury as to the government's opinion of the evidence and how the grand jury should vote. This case does not present the issue of hearsay evidence before the grand jury, but instead there is an issue of improper influence on the grand jury.

As the October 6 transcript shows, Agent Gulley was asked to and did analyze for the grand jury the testimony of appellant with reference to deletion of dividends, including the exact quotation from petitioner's testimony as included in Count II of the indictment (p. 11-12). Agent Gulley was then asked about the grand jury testimony of Alice Eads on the same subject (p. 12-17). Finally the agent was asked (p. 17):

> "Q. And it was that specific conversation that Bednar denied, right?
>
> A. That's correct.
>
> Q. That he would not tell Alice Eads anything like that?
>
> A. That's correct."

Thus Agent Gulley gave a clear direction to the grand jury as to Count II of the indictment.

Government counsel then had Agent Gulley smmarize petitioner's grand jury testimony as to IRS forms 1087 (p. 18-20, 24), following the allegations of Count I of the indictment. The agent followed with an analysis of the contradictory testimony of Alice Eads (p. 20-22). Thereby the grand jury was instructed as to the perjury forming the basis for Count I.

Then the prosecutor and Agent Gulley turned to a review of the testimony concerning the J. A. Miller new account report to support Count III of the indictment. Agent Gulley again summarized petitioner's grand jury testimony (p. 26-29), and then the conflicting grand jury testimony of Denise Hertlein (p. 29-32), thus giving direction to the grand jury as to voting the perjury offense contained in Count III.

Immediately thereafter, Agent Gulley was asked the following (p. 32-33):

> "Q. Would that also constitute, that J. A. Miller account, keeping a false book and record as far as the Securities and Exchange Commission was concerned?
>
> A. Yes, sir, it would. One of the regulations that is required by the Securities and Exchange Commission is the maintenance of a customer account card for all customers, maintaining brokerage accounts at any brokerage firm.
>
> Q. And along with that goes the implied regulation that if you are going to keep records, you can't put phony and fraudulent records into the account?
>
> A. That's correct. To fraudulently enter false information on the documents is a violation of federal law."

Thereby, the grand jury was directed by government counsel and Agent Gulley to return an indictment on Count IV.

The October 6, 1982, transcript of Agent Gulley's grand jury testimony reveals that, in conjunction with the United States Attorney, he was directing the grand jury as to the government's opinion of what the evidence and his investigation showed and how the grand jury should vote to return the indictment — which they did shortly thereafter. We believe that this was an abuse of the grand jury process. In similar circumstances other courts have quashed indictments resulting from such a procedure.

In *United States v. Farrington,* 5 F. 343, 347 (N.D. N.Y. 1881), an attorney representing creditors of banks which had been defrauded by defendants appeared before the grand jury and summarized documents and other evidence. Of this, the Court said:

> "It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney; and it seems much more probable that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter."

In *United States v. Kilpatrick,* 16 F. 765 (W.D.N.C. 1883), an examiner of the Department of Justice appeared before the grand jury and performed a function similar to that of Agent Gulley here. In quashing the indictment, the Court said (l.c. 769-770):

"A prosecuting officer has no right to send witnesses to the grand jury room merely to be interrogated whether there has been any violations of law within their knowledge.

* * *

". . .They [grand jurors] should be governed, as to questions of law, by instructions from the judge, and such instructions should generally be given in open court. No other person has a right to give a grand jury an opinion on questions of law which affect the rights of individuals or society.

* * *

". . .When before the grand jury these officers may properly assist this body in the examination of witnesses; may direct them in matters of procedure according to the well-settled course and practice of the courts; may read statutes upon which bills of indictment are founded; but they cannot give opinions upon questions of law which affect the rights and liberties of the citizen charged with crime, or give any advice as to the weight and sufficiency of evidence."

In *United States v. Wells,* 163 F. 313 (D. Idaho 1908), the district attorney, at the conclusion of all of the grand jury testimony, summarized the evidence and discussed the law and the facts. The Court said (l.c. 322):

"The conduct of the district attorney before that body was the equivalent of expressing the unqualified opinion that the evidence established the guilt of the defendants; that they ought to indict them; . . ."

In quashing the indictment, the Court held (l.c. 325) that "the district attorney should not give advice or express his opinion as to the sufficiency of the evidence."

In *United States v. American Tobacco Company,* 177 F. 774, 778-779 (W.D. Ky. 1910), the witness was a lawyer and special agent of the Interstate Commerce Commission. Although not finding misconduct sufficient to quash the indictment, the Court said:

> "The grand jury should be an independent body, free from such arguments, influences, or persuasions. In what it does it should act upon the testimony and the charge of the court, and any intrusive suggestions or arguments put before it by a mere witness is an impertinence, if not indeed a contempt; particularly if made by one who, occupying an official position, has gained access to the grand jury under the pretense of being a witness. The Interstate Commerce Commission has important functions, but they are outside of the courts, and in a special sense outside the grand jury room."

In *United States v. Cosby,* 601 F. 2d 754 (5th Cir. 1979), the facts are similar to the instant case in that the FBI case agent summarized witnesses' statements and his investigation for the grand jury. In reversing a perjury conviction and ordering a judgment of acquittal because there was no adequate proof of materiality of the defendant's statements to the grand jury's investigation, the Fifth Circuit said (l.c. 758-759):

> "Historically a bulwark of the citizen, the grand jury must not be perverted into a rubber stamp for prosecutors or investigatory agencies. The constitutional purpose of the grand jury is surely thwarted if we assume that the direction or scope of its inquiries is determined by the investigators who bring evidence to its attention."

The instant case presents a situation where, between the government prosecutors and the FBI agent, the grand jury was told precisely what the government wanted it to do. Such conduct constituted improper influences on the grand jury and an abdication of their function, in violation of the Fifth Amend-

ment guarantee that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."

Petitioner believes that the Court of Appeals has decided this case in conflict with long-established law. In addition, the problem here involved has probably occurred on frequent occasions, but because of the traditional secrecy of grand jury proceedings, it has not often been revealed as here. The opportunity for abuse of the grand jury process suggests that this is a matter of importance requiring direction by this Court.

For these reasons, we respectfully suggest that certiorari should be granted as to this Question.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1227

United States of America,
Appellee,

v.

Leonard Bednar,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted: November 16, 1983
Filed: February 24, 1984

Before ROSS and ARNOLD, Circuit Judges, and HUNTER, District Judge.*

ROSS, Circuit Judge.

Appellant, Leonard Bednar, was indicted on three counts of making false material declarations before a grand jury in violation of 18 U.S.C. § 1623. In addition, Bednar, as a registered broker-dealer, was indicted on one count of making false entries on the books and records of Stix & Co., Inc., in violation of 15 U.S.C. § 78q to 78ff. After a six day trial, the jury found Bednar guilty on all four counts charged. On February 4, 1983,

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* The Honorable Elmo B. Hunter, Senior Judge, United States District Court for the Western District of Missouri, sitting by designation.

Bednar was sentenced to concurrent terms of five years imprisonment on each count and a fine of $1,000 on each count, for a total of $4,000.

Bednar has raised numerous issues on appeal including challenges to the district court's findings of materiality, the sufficiency of the evidence on count four, suppression of the grand jury testimony, the propriety of an FBI agent's testimony before the grand jury, and the court's decision to limit the time allotted to closing arguments. For the reasons set forth herein, we affirm the conviction of Bednar on all counts.

I. General Background

Stix & Co., Inc. (Stix), located in St. Louis, Missouri, was a broker-dealer firm engaged in the business of selling securities to the public. In November of 1981, Thomas Brimberry, a senior vice-president of Stix, revealed a major embezzlement scheme in which Brimberry, the majority shareholder, and other poeple siphoned enormous amounts of money from the firm. During the revelation of this scheme, Brimberry did not inculpate Bednar as a participant, although Bednar and Brimberry shared commissions on all sales made by either person. Pursuant to Brimberry's information, the FBI, the IRS and the SEC became actively involved in a complete investigation of the books and records of Stix. An examination by the SEC revealed that over thirty-four million dollars worth of securities were missing from the firm. After discovering the magnitude of the missing assets, the SEC enjoined Stix from doing any business and a temporary receiver was appointed to marshal the assets of the firm. Stix was ultimately determined to be insolvent and went into receivership. The total loss to the investing public due to the embezzlement was found to be in excess of fourteen million dollars.

The FBI determined that the money had been stolen by the manipulation of ten margin accounts controlled by Brimberry. It appears that Brimberry made false computer entries showing

that large amounts of securities were placed in these ten accounts, thus building up the borrowing power of these accounts. Once falsely built up, the "individual" named on the account was able to borrow, in cash, up to half the value of the bogus securities listed in the account. At various times, Brimberry placed counterfeit securities in the Stix vault to deceive the auditors. Once the appearance of equity was created in these ten accounts, Brimberry siphoned money by authorizing checks to be drawn from these accounts.

In February of 1982, a grand jury convened to investigate the embezzlement from Stix. The grand jury was attempting to ascertain how fourteen million dollars could be stolen from Stix, where the money went, who was involved in the scheme, and why, for five years, the books indicated that the firm was in good financial condition. Bednar was one of the first witnesses called to testify before the grand jury because of his position as Brimberry's immediate supervisor.

Count I alleged that Bednar falsely testified that he always sent 1087 forms (forms which alert the IRS that taxes are due on margin accounts) to the IRS and that he never told Brimberry not to send these forms to the IRS. Count II alleged that Bednar falsely testified that the only conversation he had with Alice Eads (a Stix employee) regarding the deletion of dividend entries into the Stix computer was telling her to follow Brimberry's instructions on the matter. Count III alleged that Bednar falsely testified that he had prepared the J.A. Miller new account card by sitting down with Brimberry in 1977, asking questions about the person's background, and filling out the card by using such information.

At trial, the government introduced evidence to show the falsity and materiality of Bednar's statements to the grand jury. On count I, the government's evidence showed, through the testimony of Alice Eads, that Bednar had not mailed the 1087 forms in tax year 1979 and that he told Brimberry not to mail them in 1980 as he had not mailed them the previous year. To

show materiality on this issue, the government introduced grand jury transcripts along with testimony of the grand jury foreman to clarify that the scope of the grand jury inquiry was quite broad as it included a determination of how the embezzlement scheme actually worked. The grand jury had heard evidence that the individuals involved in the scheme were worried that if the 1087 forms were sent to the IRS, an audit would be ordered upon the realization that no taxes were being paid on these margin accounts. Thus, this statement is alleged to be material as it impeded the grand jury's efforts to determine how the scheme worked and who was involved in the cover-up of such scheme. On count II, Alice Eads testified that Brimberry and Bednar told her to delete all the dividends on securities which she could not find on the premises of Stix. Eads further testified that she was told to delete the dividends from the computer and throw away the backup papers. The government submits that this was material as it impeded the grand jury in determining Bednar's role in the scheme and how the scheme operated for so long without detection. On count III, Denise Hertlein (a Stix employee) testified that Bednar filled out the J.A. Miller new account card, by himself, in 1981 after the SEC examiners asked to see such card. The grand jury transcripts introduced on the issue of materiality showed the J.A. Miller account was one of the main accounts in which the embezzlement occurred. The government contends such statement is material as it impeded the grand jury's efforts to determine the inner workings of the scheme and its participants.

II. Analysis

A. Materiality

Bednar asserts, on appeal, that the government attempted to prove materiality by general statements from the grand jury foreman and grand jury testimony by FBI agent Gulley. Bednar contends that the evidence in this case is insufficient to prove materiality as was the evidence found insufficient in *United*

States v. Cosby, 601 F.2d 754 (5th Cir. 1979). In *Cosby,* the court held that absent a transcript of grand jury testimony, the testimony of only an FBI agent is insufficient to show materiality. We find that Bednar's reliance on *Cosby* is misplaced because in the instant case, the transcript of the grand jury proceedings *and* the testimony of the grand jury foreman supplemented the testimony of the FBI agent. This is exactly the evidence contemplated by the court in *Cosby. Id.* at 757.

To show a violation of 18 U.S.C. § 1623 the government has the burden of proving that the defendant's statements were material to issues considered by the grand jury. *United States v. Ostertag,* 671 F.2d 262, 264 (8th Cir. 1983). The test for determining materiality is whether the allegedly perjurious statement tends to impede or hamper the course of the investigation by the grand jury. *United States v. Varsalona,* 710 F.2d 418, 421 (8th Cir. 1983). The question of whether the government has met its burden on the issue of materiality is for the court to decide as a matter of law. *Id.* Although materiality is a question of law, its proper determination is dependent upon the factual situation in which the testimony was given. *United States v. Armilio,* 705 F.2d 939, 941 (8th Cir.), *cert. denied,* 104 S.Ct. 235 (1983). In *Armilio,* this court explained that the

> government must, therefore, introduce evidence of what the grand jury was investigating, and of what testimony the defendant gave. Materiality is a legal term describing a relationship between these two sets of facts. By submitting, for example, a transcript of the grand-jury proceedings, the government enables the trial court to assess a multiplicity of facts and decide as a *matter of law* whether the perjured statements were material to the grand jury proceedings.

Id. On review, this court must view the evidence in the light most favorable to the verdict. *United States v. Williams,* 552 F.2d 226, 229 (8th Cir. 1977).

In viewing the evidence in the light most favorable to the verdict, we conclude that the government has sufficiently established both the falsity and the materiality of the statements at issue in this case. The government introduced sound evidence that the scope of the grand jury's investigation was broad and included an inquiry into the inner workings of the scheme, its participants and how it went undetected for such an extended period of time. The testimony of Bednar impeded the course of the investigation because it clouded the grand jury's inquiry into such matters as whether Bednar was actively involved, merely aided in the cover-up or, if he was not involved, why the scheme went undetected for so long. Thus, we find that the government met its burden of proving that Bednar's statements were material to issues considered by the grand jury.

B. New Account Card

Count IV of the indictment charged a violation of 15 U.S.C. § 78q(a)(1) which provides, in relevant part, as follows:

> Every***broker or dealer***shall make and keep for prescribed periods such records***as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

The record involved was the new account card for the margin account of J.A. Miller, which the government contends was a document required to be kept by 17 C.F.R. 240.17a-3, specifically, subparagraph 9, which requires the following be kept:

> A record in respect of each cash and margin account with such member, broker or dealer, containing the name and address of the beneficial owner of such account and, in the case of a margin account, the signature of such owner; Provided, That, in the case of a joint account or an account of a corporation, such records are required only in

respect of the person or persons authorized to transact business for such account.

To support its position, the government called Denise Hertlein to testify that Bednar filled out the card himself, in 1981, with false information and dated the card as being prepared in 1977. Further, the government called a witness, Mr. O'Rourke, from the SEC, to testify as an expert that the new account card was a document which is required to be kept by the above-mentioned SEC rule.

On appeal, Bednar basically makes three arguments on this issue. First, Bednar submits that it was error to permit O'Rourke to express an opinion on this subject because it invaded the province of the jury on the issue of whether it was a document required by the SEC. Second, Bednar asserts that the evidence was insufficient to establish that this was the document required by the SEC regulations. Third, Bednar asserts that the jury instruction on this issue was erroneous because it, in effect, directed a verdict against Bednar. The court, in Instruction No. 21, instructed the jury that the J.A. Miller new account card is a record which contains the same information as that which is required by a rule of the SEC.

Taking Bednar's arguments in order, we find his argument as to O'Rourke's testimony to be without merit. Rules 702 and 704 of the Federal Rules of Evidence allow an expert to give an opinion on an ultimate fact without invading the province of the jury. Second, Bednar's challenge to the sufficiency of the evidence is reviewed under well established general principles. A conviction will be upheld if, taking the view most favorable to the government, there is substantial evidence to support the jury's verdict. *United States v. Richmond,* 700 F.2d 1183, 1189 (8th Cir. 1983). When the evidence is viewed in this light, Bednar's allegation must fail. The testimony of Denise Hertlein coupled with that of Mr. O'Rourke provides sufficient evidence to sustain the conviction on count IV. Third, we find that Instruction No. 21 was a proper instruction to the jury. It is well

established that a defendant is not entitled to a particularly worded instruction and the trial court has considerable discretion in framing the instruction. *United States v. Richmond, supra,* 700 F.2d at 1196. We find, after a complete review of the instructions, that the trial court did not abuse its discretion in giving Instruction No. 21. When that instruction is read together with all of the instructions, there is nothing that could be construed as a directed verdict against Bednar.

C. **Suppression of Grand Jury Testimony**

Bednar asserts that prior to his grand jury appearance, he was interviewed by government agents and advised that he was not under investigation. Bednar submits that, after looking at the grand jury transcripts, he was very much a target and potential defendant at the time he testified. Thus, Bednar contends that because he was not given any *Miranda* warnings, his testimony before the grand jury should be suppressed.

It is well settled that *Miranda* rights are not required in the grand jury context. *United States v. Phillips,* 540 F.2d 319, 331 (8th Cir.), *cert. denied,* 429 U.S. 1000 (1976). The failure of the government to advise Bednar of his *Miranda* rights did not violate his fifth amendment privilege against self-incrimination. Bednar was under oath when he falsely testified before the grand jury and, as such, "he took a course that the fifth amendment gave him no privilege to take." *Id.* Our legal system provides several methods for challenging the government's right to ask questions; lying is not one of them. *United States v. Brown,* 666 F.2d 1196, 1199 (8th Cir. 1981), *cert. denied,* 457 U.S. 1108 (1982).

D. **Improper Influence**

Bednar states that after the grand jury had heard from all of the witnesses, the government again brought FBI agent Gulley before the grand jury. Bednar alleges that by a combination of leading questions and statements by the government attorney to

agent Gulley, Gulley was able to tell the grand jury that they should indict Bednar. In effect, Bednar contends that Gulley became the alter ego of the prosecutor telling the grand jury how to vote and to return indictments. Bednar asserts that the indictment should be dismissed because of improper influence on the grand jury.

We find Bednar's contention to be without merit. It has long been recognized that there is no constitutional preclusion of the use of hearsay testimony in grand jury proceedings. *See Costello v. United States,* 350 U.S. 359 (1956). Furthermore, in *United States v. Rossbach,* 701 F.2d 713, 716 (8th Cir. 1983), this court held that an indictment is not subject to dismissal where the government presents only the hearsay testimony of an FBI agent to the grand jury, when it is clear at the outset that the agent's testimony is based on information gathered from his investigation. Therefore, Bednar's indictment was not obtained by improper influence on the grand jury.

F. **Closing Argument**

Bednar submits that it was error for the trial court to limit closing argument to 20 minutes per side. We disagree. The limitation of time for arguments of counsel is within the sound discretion of the trial judge. *Butler v. United States,* 317 F.2d 249, 257 (8th Cir. 1963). We find no abuse of discretion occurred in this case as Bednar did not show that he was unable to fully and fairly present his case.

III. **Conclusion**

For the foregoing reasons, we affirm the conviction of Bednar on all counts.

A true copy.

Attest: /s/ Robert D. St. Vrain

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

83-1227-EM.
September Term, 1983

United States of America,

Appellee,

vs.

Leonard Bednar,

Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

The Court, having considered appellant's petition for rehearing and suggestion of appropriateness of rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestion of appropraiteness of rehearing en banc denied.

April 2, 1984

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1227EM
September Term, 1983

United States of America,

Appellee,

vs.

Leonard Bednar,

Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion of this Court.

February 24, 1984

APPENDIX D

Constitution of United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX E

Title 15, United States Code

§ 78q. Records and reports

Rules and regulations

(a)(1) Every national securities exchange, member thereof, broker or dealer who transacts a business in securities through the medium of any such member, registered securities association, registered broker or dealer, registered municipal securities dealer, registered securities information processor, registered transfer agent, and registered clearing agency and the Municipal Securities Rulemaking Board shall make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this chapter.

(2) Every registered clearing agency shall also make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports, as the appropriate regulatory agency for such clearing agency, by rule, prescribes as necessary or appropriate for the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(3) Every registered transfer agent shall also make and keep for prescribed periods such records, furnish such copies thereof, and make such reports as the appropriate regulatory agency for such transfer agent, by rule, prescribes as necessary or appropriate in furtherance of the purposes of section 78q-1 of this title.

§ 78ff. Penalties

Willful violations; false and misleading statements

(a) Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Title 18, United States Code

§ 1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

APPENDIX F

Code of Federal Regulations

Title 17

§ 210.17a-3 Records to be made by certain exchange members, brokers and dealers.

(a) Every member of a national securities exchange who transacts a business in securities directly with others than members of a national securities exchange, and every broker or dealer who transacts a business in securities through the medium of any such member, and every broker or dealer registered pursuant to section 15 of the Securities Exchange Act of 1934, as amended, (48 Stat. 895, 49 Stat. 1377, 52 Stat. 1075; 15 U.S.C. 78o) shall make and keep current the following books and records relating to his business:

* * *

(9) A record in respect of each cash and margin account with such member, broker or dealer containing the name and address of the beneficial owner of such account and, in the case of a margin account, the signature of such owner: *Provided,* That, in the case of a joint account or an account of a corporation, such records are required only in respect of the person or persons authorized to transact business for such account.

APPENDIX G

Rules of Fair Practices

National Association of Securiteis Dealers

Section 21.

* * *

Information on accounts

(b) Each member shall maintain accounts of customers in such form and manner as to show the following information; name, address and whether the customer is legally of age; the signature of the registered representative introducing the account and the signature of the member or the partner, officer or manager accepting the account for the member. If the customer is associated with or employed by another member, this fact must be noted. In discretionary accounts, the member shall also record the age or approximate age and occupation of the customer as well as the signature of each person authorized to exercise discretion in such account.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. S1-82-274 CR (2)

United States of America,
Plaintiff,

vs.

Leonard Bednar,
Defendant.

MOTION TO SUPPRESS DEFENDANT'S GRAND JURY TESTIMONY

Now comes defendant and moves the Court to suppress all testimony which defendant gave before the grand jury, for the following reasons:

1. Defendant received a subpoena to appear before the grand jury on the 25th day of February, 1982.

2. Based upon FBI reports and grand jury testimony furnished to defendant's attorney late in the afternoon of January 7, 1983, defendant believes that at the time he appeared before the grand jury he was a suspect in this case and a target of the investigation; in support of such belief, defendant states the following:

A. Defendant was interviewed on November 5, 1981 and January 26, 1982, by an agent of the Federal Bureau of Investigation and Mr. Kane.

B. Several weeks prior to his appearance before the grand jury, defendant was advised by government counsel that he was not under investigation.

C. Prior to defendant's appearance before the grand jury, numerous other persons were interviewed by FBI agents, government attorneys and representatives of the Securities and Exchange Commission.

D. On February 25, 1982, immediately prior to defendant's testimony, FBI Agent John T. Gulley testified before the grand jury and, according to the transcript of his testimony furnished to defendant, which has been designated as Exhibit No. 17 on the government's exhibit list, a juror asked (page 14): "How come you don't have Bednar on there as part of the indictment that you're asking?" At that time Mr. Adelman responded: "Okay, I think it's yet to be determined what Mr. Bednar's role was in this matter. Mr. Bednar desires to testify in front of you. Mr. Brimberry has indicated to us that Mr. Bednar was not involved, and I think that's a situation that eventually you're going to have to determine. We've not decided yet who was involved, if anyone. That's what this investigation is about."

3. Thereafter, without being informed that there was a change in the government's position as to defendant and without being given any warnings whatsoever as to his rights or that he was a suspect or target of the investigation, defendant testified before the grand jury on February 25 and February 26, 1982.

4. After defendant finished his testimony, James A. Hamer, a former employee of Stix and Co., testified before the grand jury on February 26, 1982, and was told by government counsel, as indicated on page 2 of the transcript of his testimony, "that we are investigating the irregularities at Stix and Co. and the money that was taken out of that account and that company and its ultimate bankruptcy. You are not a target of this investigation. To this point, no one has made any allegations of any willful, criminal wrongdoing that you have committed so you are not a target."

5. Thereafter on February 26, 1982, Alice Eads, also a former employee of Stix and Co., testified before the grand jury and, according to page 126 of her grand jury testimony, was told: "I want you to understand that you are not a subject of this investigation at all - in other words, you are not suspected of committing any criminal activity."

6. On March 10, 1982, Daniel L. O'Connell, a former employee of Stix and Co., appeared before the grand jury but prior thereto, Mr. Adelman made the following statement to the grand jury:

> "The first witness that you'll hear this morning, and I anticipate that it will be a fairly lengthy witness, probably taking the whole morning, is Mr. Daniel O'Connell, who I think you heard Mr. Hamer refer to. He was the chief financial officer and treasurer. He has been very cooperative in this investigation. However, because of certain reports that he signed and certain other supervisory functions that he had, there is the possibility that he has some criminal culpability and he has been explained this and understands it; is that right, Ron? You talked to him about that. So I will be explaining that to him prior to his testimony. However, he does desire to testify this morning."

Mr. O'Connell then was sworn, and the following questions were asked by Mr. Adelman and answers given by Mr. O'Connell:

> "Q. Would you state your name, please, sir?
>
> A. My name is Daniel Laurence O'Connell.
>
> Q. Mr. O'Connell, this grand jury is meeting here this morning to investigate the demise of Stix and Company, Inc., the broker-dealer firm in St. Louis; do you understand that?
>
> A. Yes, I do.

Q. And you formerly held a position of fairly high responsibility with that firm, did you not?

A. Yes, I did.

Q. And, Mr. O'Connell, before we start today, I just want to explain to you something that I believe Mr. Kane covered yesterday, and that is that because of your position and certain reports that you signed, our office has not made a decision as yet as to whether or not - what your total criminal liability is; do you understand that?

A. Yes.

Q. Okay. And for that reason you would have the right not to testify here at all if you so desired; do you understand that?

A. I understand.

Q. Have you talked to a lawyer about this matter?

A. Yes, I have.

Q. Do you desire to tesify anyhow?

A. Yes, I desire to testify."

7. Despite the fact that defendant had been assured that he was not under investigation, the question of his criminal culpability was still an open matter as far as the grand jury was concerned but he was not so advised, even though other witnesses in the same situation as former employees of Stix and Co. were either told that they were possible targets of the investigation or were assured on the record that they were not.

8. Had defendant been informed that he was a potential target of investigation or that there was a change in the government position, he would have secured the services of an attorney to appear with him at the time of his appearance before the grand jury to advise him of his rights; instead defendant had been lulled into a false sense of security.

9. Defendant believes that the foregoing excerpts from various grand jury transcripts make it abundantly clear that defendant's rights were violated, but defendant believes that there may be other transcripts or statements which were not furnished to him which may be relevant to this issue, and defendant believes that in order for the Court to be fully apprised of the factual background, all such reports and transcripts should be made available to the Court and defense counsel.

10. Defendant believes that after he testified before the grand jury, his testimony was used to obtain further leads against defendant to prosecute him on the charges now pending.

11. Defendant believes that the procedure whereby he was called before the grand jury without being sufficiently advised of the status of the investigation against him or the nature of the proceedings as they pertained to him violated his constitutional rights against being compelled to be a witness against himself and being deprived of liberty and property without due process of law, and to have the assistance of counsel in his behalf, as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States.

WHEREFORE, defendant prays that the Court grant the following relief:

1. Order the government to produce all statements and grand jury transcripts in its possession pertaining to the investigation of this matter.

2. Order that the transcripts of defendant's testimony before the grand jury be suppressed and that the government be barred from using them in any respect.

3. Determine what leads and additional evidence have come to the government as a result of defendant's grand jury testimony and bar the use in evidence of all such tainted leads and evidence.

4. Grant such further and other relief as the Court may deem proper.

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No. 83-1964

In the Supreme Court of the United States

OCTOBER TERM, 1984

LEONARD BEDNAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish the materiality of petitioner's false testimony.
2. Whether the false document prepared by petitioner was a document required to be maintained under SEC regulations.
3. Whether petitioner's grand jury testimony should have been suppressed because he was not given *Miranda* warnings prior to testifying.
4. Whether the indictment should have been dismissed because the grand jury was improperly influenced by testimony of an FBI case agent.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A9) is reported at 728 F.2d 1043.

JURISDICTION

The judgment of the court of appeals (Pet. App. A11) was entered on February 24, 1984. A petition for rehearing was denied on April 2, 1984 (Pet. App. A10). The petition for a writ of certiorari was filed on June 1, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri,

petitioner was convicted on three counts of perjury before a grand jury, in violation of 18 U.S.C. 1623, and on one count of making a false entry in records required to be kept under Securities and Exchange Commission regulations, in violation of 15 U.S.C. 78q(a)(1) and 78ff. Petitioner was sentenced to four concurrent five-year terms of imprisonment and was fined $1,000 on each of the four counts.

1. The evidence at trial (see Pet. App. A2-A4) showed that petitioner was a vice president and secretary of Stix & Co., a broker-dealer in securities registered with the SEC and doing business in St. Louis, Missouri. From 1976 to 1980 he was the chief of operations for the firm (II Tr. 132). As chief of operations, he was the immediate supervisor of Thomas Brimberry, a senior vice-president. Petitioner also bore personal responsibility for maintaining various margin accounts, *i.e.*, accounts through which clients could borrow against securities held in their name. In November 1981, Brimberry revealed that he and others in the firm had manipulated ten margin accounts by falsely representing that they contained securities that could be used as collateral for substantial loans. The SEC enjoined further operations by Stix & Co. and discovered that over $34 million in securities were missing. The total loss to the investing public eventually amounted to $14 million.

In February 1982, a federal grand jury was convened to investigate the embezzlement. Petitioner, who had not been implicated by Brimberry, was one of the first witnesses to testify. Petitioner denied any personal involvement in three specific aspects of the cover-up of the embezzlement conspiracy—the failure to file tax forms pertaining to the margin

accounts; the deletion of dividend entries for those accounts; and the backdating of a new account card for the J. A. Miller margin account. The tax forms (IRS Form 1087) would have alerted the Internal Revenue Service to the existence of taxable income supposedly generated from the margin accounts. The conspirators feared that filing the forms would prompt an IRS audit, which in turn would uncover the embezzlement scheme. Petitioner testified before the grand jury that he always mailed the forms to the IRS, and he denied having told Brimberry not to mail the 1980 tax year forms. In fact, petitioner had not mailed the forms for the 1979 tax year and, in a conversation witnessed by a Stix employee, had told Brimberry not to mail the forms for the 1980 tax year.

On the face of company records it appeared that the non-existent securities in the margin accounts were generating dividends. Petitioner testified before the grand jury that he told Alice Eads, a Stix employee, merely to follow Brimberry's instructions concerning the apparent dividends. In fact, petitioner and Brimberry instructed Eads to delete any record of dividends from the firm's computer and to throw away the back-up documentation if the underlying security could not be found on the firm's premises.

Petitioner also testified before the grand jury that he prepared the new account card for the J.A. Miller margin account (one of the bogus margin accounts used by the embezzlers) in 1977 when he sat down with Brimberry and took down data on Miller's background. A Stix employee testified that petitioner had filled out the J.A. Miller card in 1981, following an SEC examiner's request to see the card, and had done so without consulting Brimberry.

These three denials formed the basis for petitioner's perjury convictions. Petitioner's false entry conviction was based on his backdating of the new account card for the fraudulent J.A. Miller margin account.

2. The court of appeals affirmed petitioner's convictions (Pet. App. A1-A9). The court held that the government had met its burden of proving that petitioner's false statements were material to matters considered by the grand jury. The court of appeals also concluded that the trial court did not err in admitting expert testimony by an SEC official that a new account card is a document required by SEC regulations, that the evidence was sufficient to show that the card in fact was required by SEC regulations, and that the jury instruction on this issue was proper. The court held further that government agents were not required to give petitioner *Miranda* warnings before his grand jury testimony; that the indictment of petitioner was not obtained by improper influence on the grand jury; and that the trial court did not abuse its discretion in limiting closing arguments to 20 minutes per side.

ARGUMENT

1. Petitioner contends (Pet. 7-11) that the government failed to establish that his false declarations were material to the investigation being conducted by the grand jury. The court of appeals properly rejected this contention.

Petitioner does not dispute that his testimony before the grand jury was false. Nor does he deny that his false statements tended to impede the grand jury investigation, and were therefore material, if the government has correctly described the scope of the

investigation.[1] See *United States* v. *Ostertag*, 671 F.2d 262, 264 (8th Cir. 1982); *United States* v. *Brown*, 666 F.2d 1196, 1200 (8th Cir. 1981), cert. denied, 457 U.S. 1108 (1982); *United States* v. *Thompson*, 637 F.2d 267, 268 (5th Cir. 1981). Petitioner contends, however, that the government's proof of materiality was qualitatively insufficient. He relies primarily on *United States* v. *Cosby*, 601 F.2d 754 (5th Cir. 1979), in which the court held that testimony of a grand jury witness and an FBI investigator concerning what they believed to be the scope of the grand jury investigation in that case could not be used to prove what the grand jury was actually investigating.

Petitioner's suggestion of a conflict between *Cosby* and the decision below is without basis. In *Cosby* there was no direct evidence of what the grand jury was investigating, but only the opinion testimony of two individuals who did not have actual knowledge about the scope of the inquiry.[2] The *Cosby* court

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[1] The government introduced evidence to show that the grand jury was attempting to determine how $14 million had been stolen from Stix & Co. through manipulation of margin accounts, where the missing money had gone, who was involved in the scheme, why the books and records of Stix & Co. showed false information for a five-year period, and why the scheme went undetected for a long period of time. The court of appeals correctly concluded (Pet. App. A6) that petitioner's false testimony was material because it impeded the grand jury's inquiry into whether petitioner was actively involved in the scheme, whether he merely aided in the cover-up, and, if he was not involved, why the scheme went undetected for so long.

[2] The grand jury foreman also testified in *Cosby*, but his testimony was limited to a statement that the defendant had appeared and testified under oath before the grand jury. *United States* v. *Cosby*, 601 F.2d at 757 n.4.

noted specifically that in that case the government had not offered either a transcript of the grand jury proceedings or the testimony of the foreman or some other member of the grand jury. 601 F.2d at 757. Here, in contrast, the deputy foreman of the grand jury testified concerning the nature and scope of the grand jury investigation (II Tr. 188-194).[3] In addition, the government provided the district court with the transcript of the FBI case agent's grand jury testimony, as well as the transcript of petitioner's grand jury testimony. The agent's testimony summarized the evidence given by other grand jury witnesses, which contradicted petitioner's sworn testimony.[4] Both the deputy foreman's trial testimony and the transcripts of the grand jury testimony al-

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[3] Petitioner seeks to discount the significance of the deputy foreman's testimony (Pet. 8). But that testimony must be viewed in the light most favorable to the government. See *Burks* v. *United States*, 437 U.S. 1, 17 (1978). The deputy foreman testified expressly that the grand jury was investigating possible violations of the securities and mail fraud laws in connection with the Stix & Co. case (II Tr. 189); that it was looking into why the Stix books showed that the bogus margin accounts were in proper order (*id.* at 190); that it was investigating the fact that IRS forms had not been sent to the IRS in certain years (*ibid.*); and that it was looking into the circumstances surrounding the filling out of the J.A. Miller new account card (*id.* at 191, 193). That testimony was clearly sufficient to allow the trial court to conclude that petitioner's false responses were material to the grand jury's investigation.

[4] In contrast, in *Cosby* the FBI investigator apparently did not himself testify before the grand jury or examine any of the grand jury testimony, but merely conducted his own investigation. There was no indication that the grand jury had advised the investigator of the scope of its inquiry or directed his investigative activities. 601 F.2d at 758.

lowed the court to determine the nature of the grand jury's investigation and, in turn, to conclude that petitioner's false testimony was material to that investigation. The evidence presented to the court in this case was more than sufficient to establish the relationship between "what the grand jury was investigating, and * * * what testimony [petitioner] gave." *United States* v. *Armilio*, 705 F.2d 939, 941 (8th Cir.), cert. denied, No. 83-55 (Oct. 11, 1983).[5]

2. Petitioner next contends (Pet. 11-14) that the new account card he completed and backdated was not a record that Stix & Co. was required to keep under SEC regulations; that expert testimony on this subject should have been excluded; and that the jury charge on this issue was prejudicial. These contentions lack merit.

Under SEC regulations a broker-dealer must keep certain records of its operations, including a record of the name and address of the beneficial owner of any margin account and the owner's signature. 17 C.F.R. 240.17a-3(a)(9).[6] An SEC official testified at trial that the new account card was in fact a record required to be maintained under SEC regulations, that such cards are used by SEC compliance examiners to determine whether broker-dealers are

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[5] Petitioner's related suggestion (Pet. 10-11) that the FBI case agent's grand jury testimony should have been excluded as hearsay is frivolous. The transcript of the agent's testimony was introduced as evidence of what transpired before the grand jury, not to establish the truth of the matters about which he testified.

[6] Petitioner contends (Pet. 12) that the new account card is a document required by the National Association of Securities Dealers. Assuming this were so, it would not preclude a finding that the card also is required by SEC regulations.

in compliance with securities laws, and that examiners depend on the accuracy of the cards (Pet. App. A7; II Tr. 43-48, 70-74).

Petitioner attempts to avoid this clear evidence by claiming that the expert testimony of the SEC official should not have been admitted and by claiming prejudice from the jury instruction on this issue. Petitioner's contention that the expert's testimony invaded the province of the jury is without legal foundation. Under Fed. R. Evid. 702 and 704 an expert may voice an opinion on an ultimate issue to be decided by the jury. See *United States* v. *Barrett*, 703 F.2d 1076, 1084 n.14 (9th Cir. 1983); *United States* v. *Grote*, 632 F.2d 387 (5th Cir. 1980), cert. denied, 454 U.S. 819 (1981) (testimony of IRS official concerning acceptability to IRS of defendant's tax return); *United States* v. *Taylor*, 562 F.2d 1345, 1358-1359 & n.8 (2d Cir.), cert. denied, 432 U.S. 909 (1977).

The jury instruction challenged by petitioner (Pet. 13) merely stated correctly that the J.A. Miller new account card contains the type of information required by 17 C.F.R. 240.17a-3(a)(9). The trial court did not instruct the jury that it was required to find that the new account card was, in fact, the specific record required to be kept under the SEC rule. The trial court instructed the jury fully on the element of specific intent (Instr. Nos. 9A, 27). The court of appeals properly concluded (Pet. App. A7-A8) that the instruction to which petitioner objects, read in the context of the entire charge to the jury, did not prejudice petitioner's right to a fair trial.

3. Petitioner contends further (Pet. 14-17) that his grand jury testimony should have been suppressed because he was not given *Miranda* warnings

or advised that he was a target. This Court rejected a similar argument in *United States* v. *Wong*, 431 U.S. 174 (1977), which held that failure to warn a grand jury witness of her Fifth Amendment privilege did not require suppression of her grand jury testimony in connection with her indictment for violation of 18 U.S.C. 1623, since the Fifth Amendment does not protect perjury. Of course, the fact that petitioner was under oath at the time he testified before the grand jury provided ample warning against testifying falsely. Moreover, although the trial court offered him the opportunity to do so (II Tr. 7-9), petitioner failed to make a record that would support his claim that the government told him at some point that he was not under investigation. In any event, since the list of individuals Brimberry implicated in the scheme did not include petitioner, it appears that petitioner was not a target at the time of his grand jury appearance.

4. Petitioner contends finally (Pet. 17-23) that the indictment should have been dismissed because the grand jury was improperly influenced by the testimony of the FBI case agent. This contention, too, lacks merit.

The court of appeals correctly held (Pet. App. A9) that there is no basis for petitioner's complaint that the agent's testimony had an improper influence on the grand jury. The agent merely summarized the testimony of other witnesses. It is clear that the grand jury could properly consider such testimony. See *Costello* v. *United States*, 350 U.S. 359 (1956); *United States* v. *Rossbach*, 701 F.2d 713, 716 (8th Cir. 1983). Moreover, the agent was not merely reciting hearsay from his investigation, but was recapitulating matters that had occurred before the

grand jury. Any grand juror was therefore free to rely on his own recollection of the summarized testimony. In these circumstances, it is clear that there was no improper influence on the grand jury.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 10036